

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF &
APPENDIX**

77-1234

To be argued by
RICHARD I. ROSENKRANZ

ORIGINAL

In The
United States Court of Appeals
For The Second Circuit

B
P/S

UNITED STATES OF AMERICA,

Respondent,

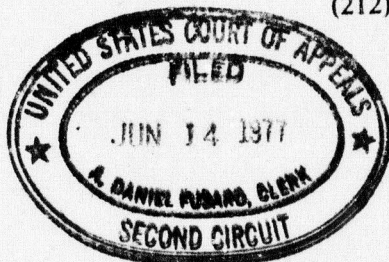
v.

ANTHONY A. TORRES,

Defendant-Appellant.

**BRIEF AND APPENDIX FOR
DEFENDANT-APPELLANT**

RICHARD I. ROSENKRANZ
Attorney for Defendant-Appellant
66 Court Street
Brooklyn, New York 11201
(212) 875-9440



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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----X
UNITED STATES OF AMERICA, :
Respondent, :
v. : Docket No.
ANTHONY A. TORRES, : 77-1234
Defendant- :
Appellant. :
-----X

STATEMENT PURSUANT TO RULE 28(3)

PRELIMINARY STATEMENT

This is an appeal from a judgment of conviction rendered on April 27, 1977 in the United States District Court for the Southern District of New York (Frankel, J.) convicting Appellant Torres after a non-jury trial of the crimes of wilful assault on a United States Correctional Officer and assault on said officer with a deadly and dangerous weapon in violation of Title 18 U.S.C. Sec.111. Appellant was sentenced to a period of imprisonment of six months on count one and was placed on a five year probationary term pursuant to his conviction under count two.

QUESTIONS PRESENTED

1. Whether as a matter of law appellant could be found guilty of assault with a deadly weapon where the reputed weapon was handcuffs attached to both hands?

2. Whether testimony presented before the Grand Jury was so prejudicial and inflammatory so as to taint the instant indictment, thereby mandating its dismissal?

STATEMENT OF FACTS

On March 31, 1977, appellant proceeded to trial before the Hon. Marvin E. Frankel on a two count indictment charging him with assault on a Federal Correctional Officer and assault on said officer with a deadly weapon in violation of Title 18 U.S.C. Sec. 111.

The Government's Case

The thrust of the charges against appellant emanated from the reputed assault by him on Hugh Herbert, a record officer in the Metropolitan Correctional Facility (hereinafter referred to as M.C.C.)

Officer Herbert testified that his function was to receive inmates as they came into or left the institution. The witness explained that the Receiving and Discharge Unit (R&D) is utilized for inmates who are returning from court and who must then be searched and dressed in their prison uniform. (7-8)*

*Numerical references are to the pages of the trial transcript.

Specifically, on December 2, 1976 at 1:00 p.m., Officer Herbert was working in the R&D unit office and was receiving inmates who were returning from court. Appellant, accompanied by a Marshall, was returned at that time from the Southern District Court. After Herbert processed his papers, appellant was sent into the R&D unit where he was to be dressed in the institutional uniform under the supervision of Officer McGowan. (11) Approximately four minutes later, Deputy White returned two other inmates from court, one of whom was named Wilson. As he was processing their papers, Wilson walked by him and went into the R&D section. (12) He then ordered Wilson to return and Officer McGowan responded, "One second. Herb, I will send him out." (12) In the meantime, appellant, who was also standing there, hollered in a loud voice, "you don't have to take that shit from him." He then took off his glasses, threw them on the desk and came charging at Officer Herbert, saying he "was going to kick my ass." (12)

Herbert stated that he grabbed appellant's hands and with McGowan's assistance wrestled him to the floor. As he was on the floor, appellant, said, "I will get you sucker, I am going to get you." (13) Marshall White then placed handcuffs on appellant to restrain him. (13) After appellant was so restrained, they intended to place him in a holding cell. (16) However,

when Officer Herbert opened the door to the holding cell and stepped back to admit appellant, appellant suddenly brought both hands up and swung at him, hitting him in the mouth with the handcuffs. (17)

Officer Herbert at that point realized that he was bleeding and observed the other officers restraining appellant. (19) Immediately thereafter, he went to the dispensary and was then sent to Bellevue Hospital for medical treatment. According to the witness, two teeth were broken and two were cracked. As a result of his injuries, he remained out of work for 17 days. (21) The witness denied ever striking or hitting appellant behind the ear. (32)

Herbert's testimony was supported in part by Officers Henry McGowan (42-46), Robert Roemer (65-70), Deputy United States Marshall Robert W. White (73-80), inmate Joseph B. Wolhendler (88-92), and Donald Holly (109-122). Additionally, Ricardo Walters, Physician's Associate at the M.C.C. Medical Department, testified that he had examined appellant after the incident but found nothing wrong. He found no evidence of scars, lacerations, abrasions, or hematomas. (125) Further, appellant gave no response when asked if he had any pain. (126)

DEFENSE

Appellant's version of the facts differed materially from the above witnesses.

On the date in question, appellant had entered the R&D unit and had been waiting for Officer McGowan to get his clothes when inmate Wilson entered the unit. (128-129) Officer Herbert followed Wilson into the room and in a hostile manner pointed his finger in his face, stating "Did I tell you to come in here." (129) Appellant then told Wilson in a low voice that he didn't have to take that from him. Although he didn't intend that Herbert should overhear this remark, he evidently did. Whereupon Herbert removed his glasses and rushed at him. Officer McGowan grabbed appellant from behind and held both his arms while Herbert punched him in the stomach twice. (130) He was then forced down on the floor and cuffs were placed on his hands.

As Officer Holly entered the unit, Herbert said that they should take him to the other room. (130) They then escorted him to the holding pens and it was his impression that they were going "to work him over." (131) When appellant walked passed Officer Herbert, who had opened the cell door, Herbert punched him behind the ear. It was only in self defense that he struck back. (131) However, he was forced to the floor where Herbert proceeded to kick him in the ribs and head. (133)

According to appellant, he was escorted to the doctor's office a few minutes later. A Captain Drew rushed at him and banged his head against the wall. Since Lieutenant Holly was holding his cuffs down, he could not defend himself. (134)

They then placed a chain around his waist to which they attached his handcuffs. These cuffs were too tight and appellant also claimed that at this time he was bleeding from both his nose and mouth. (134) Appellant further maintained that he was kept in isolation for some time and was not fed until December 6th. Further, they did not return his glasses to him until February 1st. (136-36) Finally, appellant asserted that he did not receive any medical attention at any time. (134)

In support of his testimony, appellant presented the following witnesses:

Kim Cranshaw, incarcerated on multiple bank robberies, verified his story. (178-79)*

*Robert Morgan, Assistant United States Attorney General, was produced on rebuttal and his testimony was to the effect that Cranshaw was in court before Judge McMahon during the time of the incident. (195) Additionally, Daniel Wright, M.C.C. Officer, stated that on December 2, 1976, he was receiving people back from court. The M.C.C. report revealed that Cranshaw was not returned from court until 10:24 p.m. (246)

Arthur Williams, an inmate, testified regarding appellant's physical condition at 1:00 p.m. and asserted that he was bleeding from the nose and mouth and was also handcuffed and chained. (187)

Harold Koenigsburg, also an inmate, stated at about 1:30 p.m. on that day, he saw appellant, who had a chain around his waist with handcuffs attached, in the segregation unit. Appellant could not sit or relieve himself without undergoing some harm. He also had a bloody face and was not wearing his eyeglasses. (201-203)

William Wilson, also incarcerated at M.C.C., stated that when he entered the R&D unit to change his clothes, Officer Herbert started hollering, "Hey, listen, don't ever walk past this office again. When you come back, stop here." (220) Appellant told him that he didn't have to take that shit. Herbert in turn responded you are talking about me and as he approached appellant said something to the effect "I will kill you." Appellant then replied "go ahead." (222) Next they were wrestling on the floor after which appellant was handcuffed. He could not see into the bullpen but heard one officer say to Herbert, "Come on, Herbert, what do you want to do, blow your whole career." (223)

ARGUMENT

POINT I

AS A MATTER OF LAW, APPELLANT COULD NOT BE FOUND GUILTY OF ASSAULT WITH A DEADLY WEAPON WHERE THE REPUTED WEAPON WAS HANDCUFFS ATTACHED TO HIS HANDS.

The gravamen of the second count of the indictment against appellant was that he assaulted Officer Herbert with a deadly weapon; to wit, the handcuffs attached to his hands. Although the facts in this case were sharply disputed by appellant and his witnesses, it is recognized that at this juncture for the purposes of this particular argument, this Court is bound to view the facts in a light most favorable to the Government. Accepting this axiom, it is nevertheless submitted that on the unique facts of this case that the reputed weapon (the handcuffs) cannot be deemed a "deadly and dangerous" weapon within the meaning of Title 18 U.S.C. Sec. 111.

Significantly, appellant was charged with an additional count of simple assault which occurred only minutes before the assault which we are here contesting. According to all the Government witnesses, the first assault by appellant was totally unprovoked by any of the correctional officers. But more important, each and every witness to the event

testified that during this interval, appellant, for some inexplicable reason, was in such a state of turmoil that he had to be restrained and placed in a holding pen until he was sufficiently subdued. The second assault then occurred as appellant was being placed in the holding pens. He again swung at Officer Herbert and unfortunately, broke two teeth and cracked two teeth. Given the chain of circumstances that existed in this case, there can be no question but that the more severe charge of assault with a deadly weapon occurred only because of the fortuitous happenstance that appellant had been compelled to don the handcuffs and not because he had evinced any intent to use them as weapons.

The record is barren of any evidence that appellant had any intent to use said handcuffs as a dangerous weapon. And, of course, intent is an integral element of the crime charged. United States v. Feola, 420 U.S. 671 (1975). On the contrary, the facts indicate that appellant possessed the same intent that existed at the time of the first assault which had occurred only moments before. There is no proof that his state of mind or his mens rea had

changed during these few moments. In fact, the Government witnesses all seemed to be of the opinion that appellant was still in a highly agitated state. Hence, when he swung at Officer Herbert again, the Government failed to establish the requisite proof that appellant merely intended to swing at the officer with his fists rather than utilizing the handcuffs as a deadly weapon. The proof is perfectly consistent with the theory that the cuffs hit the officer accidentally rather than intentionally. Under these circumstances, appellant must be given the benefit of the doubt especially where both inferences are equally as compelling.

Furthermore, it must be emphasized that this case is not one where it can be easily ascertained from the nature of the weapon that the defendant had an intent to use it as a deadly and dangerous weapon. see Pietczak v. United States, 188 F.2d 418 (5th Cir., 1951) (where the reputed weapon was a butcher knife), and Taylor v. United States, 456 F.2d 1101 (5th Cir., 1972) (where the weapon used was an unloaded pistol). In these particular cases, the intent of the defendant to use said weapons could clearly have been inferred by the nature of the weapon used.

Therefore, this Court should modify appellant's conviction on the second count to simple assault since there is no evidence that he intended to use the handcuffs that he had been forced to wear as a deadly weapon rather than simply his hands in the commission of this assault.

POINT II

THE TESTIMONY PRESENTED BEFORE THE GRAND JURY WAS SO PREJUDICIAL AND INFLAMMATORY SO AS TO TAINT THE INSTANT INDICTMENT, THEREBY MANDATING ITS DISMISSAL.

During the course of the trial, counsel moved to dismiss the indictment predicated upon his contention that said indictment had been procured only because of the highly prejudicial, inflammatory, and erroneous evidence that had been presented to the Grand Jury by the Government. Specifically, counsel alluded to the Government's question to Herbert wherein he asked and Herbert responded:

Q. Are you aware, sir, that Mr. Torres was arrested on or about November 17, 1976, for conspiracy to kill federal officers and foreign officials?

A. Yes sir.

Counsel asserted that the Assistant United States Attorney knew full well that the charges of conspiracy to kill federal officials and foreign officials had in fact been dismissed months prior to the date on which the question had been asked. Hence, as counsel maintained, it is clear that the sole purpose in asking such a damning question was to prejudice the Grand Jury and assure that an indictment would be handed down. Such a deliberate and prejudicial tactic on the part of the Government should now require the dismissal of the instant indictment.

At the outset, it is necessary to dispell the Government's argument below that Section 12 (b) (2) of the F.R.C.P. bars appellant's claim since it was not raised prior to trial. First, as counsel's motion indicates, counsel was aware of this prejudicial occurrence only the day before the trial commenced at which time he was given a copy of the Grand Jury minutes. Such short notice certainly did not give counsel ample opportunity to contest this matter thoroughly before trial. And second, the court below in accepting this particular portion of the Grand Jury minutes into evidence and by permitting counsel to submit a motion at the termination of the trial effectively dispensed with the requirement of the aforementioned rule. Thus, the issue boils down to whether

the erroneous information deliberately elicited by the Government before the Grand Jury was so prejudicial so as to taint the indictment. And counsel asserts that such was the case.

The accusations leveled before the Grand Jury consisted only of assault charges. It was blatantly unfair for the Government to bolster its charges against appellant by revealing that a complaint had been brought against him for the more heinous crime of conspiracy to kill federal officials and foreign officials. But even more devastating was the fact that the Government was well aware that said charge had been dismissed at the time of the presentation of this case to the Grand Jury. In answer to this argument, the Government maintained that such testimony was proper to show why appellant had been incarcerated at M.C.C. on December 2, 1977. Even should this argument be accepted as valid, fundamental fairness demanded that the Government should also disclose that said charges had been subsequently dismissed. This deliberate and deceitful tactic should not be condoned in our criminal justice system. This is especially true when only the Government and not any representative of the defense has access to the Grand Jury.

While it has been held that " . . . an indictment valid on its

face is not subject to challenge on the ground that the grand jury acted on the basis of inadequate or incompetent evidence . . . " United States v. Calandra, 414 U.S. 338, 345 (1971); United States v. Blitz, 533 F.2d 1329, 1344 (2d Cir., 1976), these cases are not controlling here. The facts in those cases did not involve an intentional misleading of the Grand Jury by the Government as was the case here. Instead, in the above cited cases, the evidence was subsequently declared to be illegal and the Government in its presentation to the Grand Jury did not act in bad faith in eliciting it in the first instance.

Finally, this Court should order the dismissal of the indictment as a prophylactic measure . Since only the Government has access to the Grand Jury proceedings at this critical time, the Government's conduct should come under close scrutiny and unscrupulous tactics should not be tolerated.

In sum, therefore, it should be found that the deliberate elicitation by the Government of misleading information before the Grand Jury tainted the indictment and now requires its dismissal.

CONCLUSION

For the reasons set forth in POINT I, the second count should be modified to simple assault, or in accordance with POINT II, the indictment should be dismissed.

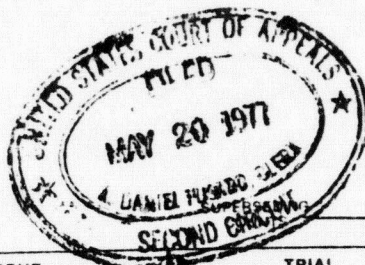
RESPECTFULLY SUBMITTED,

RICHARD I. ROSENCRANZ
Attorney for Appellant
Torres
66 Court Street
Brooklyn, N.Y. 11201
(212) 875-9440

DOCKET SHEETS

APPENDIX A

JUDGE MAGISTRATE ASSIGNED		TORRES, ANTHONY ANIBAL		Case Filed Mo. Day		03 07		77 0178		01	
0208 1 0845		5/10/77		No. of Defs # 01				Docket No.		Def.	
U.S. TITLE SECTION		OFFENSES CHARGED		ORIGINAL COUNTS							
18:111		Assault on Federal Officer		1&2							



II. KEY DATES & INTERVALS

ARREST or	INDICTMENT	ARRAIGNMENT	TRIAL
U.S. Custody, Hearing	High Risk Date	Information	Trial Set For
Summons Served	Indict. Waived	3-10-77	Voir Dire
First Appearance	In Charging District	3-10-77	Trial Began
		3-10-77	3-31-77
		Final Plea	Trial Ended
			4-1-77

U.S. MAG. CASE NO.	
AMT	Exp. Date
Set	Per. Recog
S	PSA
000	CONCITONS
Date	10% Deposit
	Surety Bond
Bail Not Made	Collateral
Status Changed (See Docket)	3rd Pny Cutt Other
Disposition of Charges	
4-1-77	
Convicted	On A. Charges
Acquitted	On Lesser Offenses
Dismissed	WOP WWP
	On Government's Motion

MAGISTRATE		INITIAL/NO	OUTCOME
Search Warrant	Issued	INITIAL APPEARANCE DATE	DISMISSED
Summons	Issued	PRELIMINARY EXAMINATION	HELD FOR GJ OR OTHER PROCEEDING IN THIS DISTRICT
Arrest Warrant Issued	Returned	OR	HELD FOR GJ OR OTHER PROCEEDING IN DISTRICT COURT
COMPLAINT	Served	REMOVAL OR ARREST	
OFFENSE (If Complaint)		WAIVED	
		NOT WAIVED	
		INTERVENING PROCEEDMENT	

U.S. Attorney or Asst

Dominic F. Amorosa
791-1951

ATTORNEYS

RICHARD I. ROSENKRANTZ
66 Court St.
Brooklyn, New York 11201
Tel: 875-9440

Defense [] CJA [] Ret [] Waived [] Sent [] None [] Other [] FD [] CD

* Show last names and suffix numbers of other defendants on same sheet in chronological order.

DATE	(DOCUMENT NO.)	PROCEEDINGS
3-7-77		Filed Indictment.....Carter, J.
3-10-77		Deft. (In custody) present w/atty. Richard Rosengrantz & A.U.S.A. Mr. Amorson. Deft. pleads not guilty to this Indictment. Plea accepted case is assigned to Judge Frankel for all purposes 10 days for motions. Bail cont'd at \$25,000 cash of surety which was extended from a case before Judge Metzner. Deft. cont'd remanded.....BRYAN, J.
3-10-77		Filed NOTICE OF APPEARANCE of RICHARD I. ROSENKRANTZ 66 Court St. Brooklyn, N.Y. 11201 Tel: 875-9440.
3-23-77		Pre-trial Conference held. Motion for reduction of bail denied. Trial set for 10:15 AM. 3-31-77. FRANKEL, J.
3-31-77		Deft. atty Richard Rosenkrantz pres. waives trial by jury. Non-jury trial commenced. So ordered FRANKEL, J.
4-1-77		Trial continued and concluded. Court renders a verdict of GUILTY as to both counts. P.S.I. ordered. Sentence set for 9:30 am 4-27-77. REMANDED. So ordered.... FRANKEL, J.

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INDICTMENT
APPENDIX B

DEA:im

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

-v-

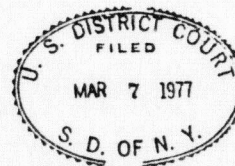
ANTHONY ANIBAL TORRES,

Defendant.

77 CRIM. 0178

INDICTMENT

77 Cr.



COUNT ONE

The Grand Jury charges:

On or about December 2, 1976, in the Southern District of New York, ANTHONY ANIBAL TORRES, the defendant, unlawfully, wilfully and knowingly, did forcibly assault, resist, oppose, impede, intimidate and interfere with a United States Correctional officer while said officer was engaged in and on account of the performance of his official duties.

(Title 18, United States Code, Section 111.)

COUNT TWO

The Grand Jury further charges:

On or about December 2, 1976, in the Southern District of New York, ANTHONY ANIBAL TORRES, the defendant, unlawfully, wilfully and knowingly, did forcibly assault, resist, oppose, impede, intimidate and interfere with a United States Correctional officer while said officer was engaged in and on account of the performance of his official duties and that in and during the commission of

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such act and acts the defendant, ANTHONY ANIBAL TORRES,
did use a deadly and dangerous weapon, namely, a set of
steel handcuffs.

(Title 18, United States Code, Section 111.)

Marion F. Jordan
FOREMAN

Robert B. Fiske, Jr.
ROBERT B. FISKE, JR.,
United States Attorney

MOTION TO DISMISS INDICTMENT
APPENDIX C

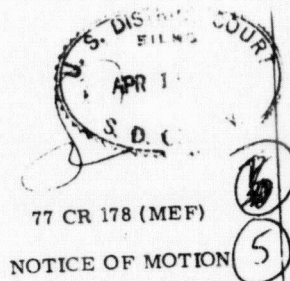
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
UNITED STATES OF AMERICA,

-VS-

ANIBAL TORRES

Defendant



77 CR 178 (MEF)

NOTICE OF MOTION

-----X
PLEASE TAKE NOTICE that upon the annexed affidavit of RICHARD I. ROSENKRANZ, ESQ., duly sworn to the 5 day of April, 1977 and the annexed memorandum of law, and all the proceedings heretofore had herein the defendant TORRES will move this Court at a time and place to be fixed by the Court, before the HON. MARVIN E. FRANKEL, United States District Judge for an order pursuant to Rule 33 of the Federal Rules of Criminal Procedure setting aside a non-jury verdict and dismissing the indictment and for such other and further relief as to the Court may seem just in the premises.

Yours, etc.

RICHARD I. ROSENKRANZ
Attorney for Defendant.
Anibal Torres
66 Court Street
Brooklyn, N. Y. 11201
(212) 875-9440

Date: Brooklyn, New York
April 6, 1977

To: Domic Amoroso
Asst. U.S. Attorney
One St. Andrews Plaza
New York, N. Y. 10007

c-1

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
UNITED STATES OF AMERICA,

77 CR 178 (MEF)

-against-

AFFIDAVIT

ANIBAL TORRES

Defendant
-----X

STATE OF NEW YORK)

SS:

COUNTY OF KINGS)

RICHARD L. ROSENKRANZ, ESQ., being duly sworn
deposes and says:

1. I am an attorney admitted to practice in the Southern District of New York and I represent the defendant Anibal Torres. This affidavit is submitted in support of the defendant's motion for an order setting aside the non-jury verdict and directing a new trial on counts One and Two of this indictment.

2. This motion was made orally during the trial because the facts had only become known to your defendant a day before the trial commenced in examining the Grand Jury minutes which had just been given to him.

3. The alleged victim of the assaults set forth in the indictment Mr. Herbert, was asked the following question before the Grand Jury.

Q. Are you aware, sir, that Mr. Torres was arrested on or about November 17, 1976, for conspiracy to kill Federal officers and foreign officials?

A. Yes sir.

4. The Assistant United States Attorney knew that

the charges of conspiracy to kill Federal officers and foreign officials had in fact been dismissed months prior to the date on which the question was asked (March 3, 1977).

5. The only relevant purpose in asking such a question would be to prejudice the Grand Jury and assure that an indictment would be handed down.

6. At the very least the Grand Jury should have been given a complete picture of the circumstances and told that the underlying charges were in fact dismissed.

WHEREFORE, the Defendant Torres respectfully requests that the motion to set aside the verdicts on Counts One and Two be granted with such other and further relief as required.

Richard I. Rosenkranz
RICHARD L. ROSENKRANZ

Sworn to before me this

5 day of April, 1977

[Signature]
JAMES J. [unclear]
New York
March 10, 1977

C-3

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APPENDIX D

DFA:cmw
4-2200

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

-v-

ANTHONY ANIBAL TORRES,

Defendant.

AFFIDAVIT

77 Cr. 178 (MEF)

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:
SOUTHERN DISTRICT OF NEW YORK)

DOMINIC F. AMOROSA, being duly sworn, deposes and
says:

1. I am an Assistant United States Attorney
in the Office of Robert B. Fiske, Jr., United States Attorney
for the Southern District of New York, and make this affi-
davit in opposition to the motion of the defendant,
Anthony Anibal Torres, for an order dismissing the Indictment
against him.

2. On March 7, 1977 the defendant was charged in
a two count Indictment (77 Cr. 178) with the commission of
two separate assaults upon a federal correctional officer.
The Indictment was premised upon the grand jury testimony of
three witnesses. These witnesses were Hugh Herbert,
Henry McGowan and Robert White. On March 24, 1977 a
non-jury trial commenced against the defendant at which all
three of these witnesses testified for the Government. The
witnesses' 3500 material, including their grand jury testi-
mony, was given to Richard Rosenkranz, Esq., defendant's
attorney, by Assistant United States Attorney Sarah Gold on
Tuesday, March 22nd. This material was made available
to Mr. Rosenkranz on Monday, March 21st by my office but

D-1

day of *April*, 19 *77*

Phyllis G. Rush

was not picked up by Mr. Rosenkranz until the next day.*
On March 25th, this Court found the defendant guilty of
both counts of the Indictment.

3. During the trial Mr. Rosenkranz orally moved to
dismiss the indictment against the defendant based on the
following portion of the grand jury testimony of the witness
Herbert, which he contended was prejudicial thereby infecting
the Indictment:

"Q. Are you aware, sir, that Mr. Torres
was arrested on or about November 17, 1976,
for conspiracy to kill Federal Officers and
foreign officials?

A. Yes sir."

This Court denied the motion but granted the defendant leave
to renew it formally subsequent to trial, which he has done
here.

4. Defendant's motion was correctly denied during
trial and should be denied again.

5. First, as the motion was not made prior to trial,
defendant has been specifically barred from raising it at
trial or at this time. Federal Rules of Criminal Procedure:
Rule (12(b)(2); United States v. Blitz, 533 F.2d 1329, 1344
(2d Cir.), cert. denied 424 U.S. 618 (1976).

* I recognize that Mr. Rosenkranz' affidavit submitted
in support of the instant motion avers that he received the
relevant grand jury material on the day before trial, or
Wednesday, March 23rd. I submit, however, that I have been
informed by Assistant United States Attorney Gold that
she gave the grand jury material to Mr. Rosenkranz on
Tuesday, March 22nd.

-2-

day of *April*, 19 *77*

Phyllis G. Rush
PHYLLIS G. RUSH
Deputy Public, State of New York
No. 03-4635198
Qualified in Bronx County

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4-2200

Rule 12(b)(2) provides as follows:

"(b) Pretrial Motions. Any defense, objection, or request which is capable of determination without the trial of the general issue may be raised before trial by motion. Motions may be written or oral at the discretion of the judge. The following must be raised prior to trial:

* * *

(2) Defenses and objections based on defects in the indictment or information (other than that it fails to show jurisdiction in the court or to charge an offense which objections shall be noticed by the court at any time during the pendency of the proceedings);" (Emphasis Added)

Clearly, as defendant's motion is premised upon the alleged submission of prejudicial material before the grand jury there- by rendering the Indictment defective, it comes squarely within Rule 12(b)(2) requiring that it be raised prior to trial. See United States v. Blitz, supra. Thus defendant's failure to raise this motion prior to trial, when his counsel was admittedly aware of the relevant testimony,* constitutes a waiver of it. United States v. Blitz, supra.

6. Secondly ". . . an indictment valid on its face," as here, "is not subject to challenge on the ground that the grand jury acted on the basis of inadequate or incompetent evidence . . ." United States v. Calandra, 414 U.S. 338, 345 (1974); see United States v. Blitz, supra; United States v. James, 493 F.2d 323, 326 (2d Cir.), cert. denied, 419 U.S. 849 (1974), and cases there cited. Thus, even assuming prejudicial material was placed before the grand jury--a proposition which we dispute--defendant's indictment is still not subject to dismissal.

7. Finally, defendant's motion fails on the merits. Contrary to the claim of Mr. Rosenkranz, at the time of the grand jury testimony in question, the complaint against the defendant for conspiracy to kill federal officers and foreign

* See paragraph 2 of the affidavit of Richard I. Rosenkranz, Esq. in support of defendant's current motion.

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D-3

day of April, 19 77

Phyllis G. Rush
PHYLLIS G. RUSH
Attorney at Law
New York, New York

DFA:emw

officials--a copy of which is attached to this affidavit*-- had not been dismissed. The complaint, which was issued by United States Magistrate Martin D. Jacobs on November 17, 1976, was then pending and its revelation to the grand jury provided the grand jury with a reason the defendant was incarcerated on December 2, 1976 when he assaulted Herbert.** Moreover, the complaint established implicitly that a United States Magistrate had determined that there was probable cause to believe that defendant had conspired to kill federal officials. If a grand jury is entitled to consider evidence obtained in violation of the constitution, see United States v. Calandra, supra, at 349-52; United States v. Blue, 384 U.S. 251, 255 n.3 (1966), it may certainly consider the type of evidence presented here.

8. In view of the wide latitude historically accorded grand jury investigations, In re Millow, 529 F.2d 770, 774 (2d Cir. 1976), the question and answer about which defendant now complains, which relates to a small fraction of the testimony of one of three witnesses who appeared

* The defendant was charged in the complaint as Henry Robinson, a/k/a "John Doe."

** Subsequent to the defendant's arrest for conspiracy to kill federal agents and foreign officials on November 17, 1976 bail was fixed on this charge at \$250,000, cash or surety. This bail was not posted and was in effect on December 2, 1976. On December 2, 1976, moreover, the Hon. Constance Baker Motley fixed an additional bail of \$25,000, cash or surety, upon the defendant on an additional charge of providing fictitious information to representatives of the Bureau of Alcohol, Tobacco and Firearms, which the defendant also had not posted at the time he assaulted Herbert in the MCC.

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day of April, 19 77

Phyllis G. Rush LS

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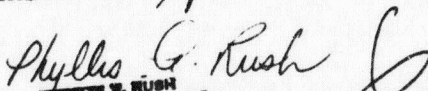
before the grand jury, could hardly be said to in any way
have prejudiced him. This is especially so in view of the
Court's finding that he was guilty beyond a reasonable
doubt of both assaults.


DOMINIC F. AMOROSA
Assistant United States Attorney

Sworn to before me this
day of April, 1977.

NOTARY PUBLIC

17 day of April, 1977


PHYLLIS G. RUSH
NOTARY PUBLIC, State of New York
No. 62-4635198
Qualified in Bronx County
Commission Expires March 30, 1978

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-v-

HENRY ROBBINSON, a/k/a "John Doe"

Defendant.

Violation of
18 U.S.C. § 371

----- x
SOUTHERN DISTRICT OF NEW YORK, ss.:

JAMES T. BURNETT, being duly sworn, deposes and says that he is a Special Agent of the Federal Bureau of Investigation, United States Department of Justice and charges as follows:

From on or about the first day of November, 197 up to and including the filing of the complaint, in the Southern District of New York, HENRY ROBBINSON, a/k/a "John Doe" the defendant, and others unknown did unlawfully, willfully and knowingly combine, conspire, confederate and agree together and with each other to commit offenses against the United States and to violate Title 18, Sections 111 and 112, United States Code.

OVERT ACTS

1. The defendant travelled to New York City to participate in the plan to commit the act hereafter described.

The bases for deponent's knowledge and for the foregoing charges are, in part, as follows:

1. Investigation in the course of his official duties;

2. Admissions by the defendant that he and the other individuals had conversations relating to plans to kill all representatives of the Republic of Korea Mission to the United Nations.

3. Admissions by the defendant that he observe two "grease guns" and two .38 caliber revolvers which he informed would be used to kill said representatives.

4. Admissions by the defendant that he observe floor plan of the Republic of Korea Mission offices, which he stated was located on the fifth floor of 866 United Nations Plaza.

And deponent further says that She sealed the said envelope and placed the same in the mail chute drop for mailing in One St. Andrews Plaza, Borough of Manhattan, City of New York 10007.

P-6

Thomas A. Burnett

Sworn to before me this
11/17/76

11-0
Investigation by deponent which confirmed
that the Republic of Korea was located on the fifth floor
of 866 United Nations Plaza.

6. Admissions by the defendant that he was to
receive \$5,000 for participating in these killings.

7. Admissions by the defendant that the plan was
to first kill two United States security officers stationed
outside the mission before entering the offices of the
mission.

8. Investigation by your deponent which confirms
that unlike most other foreign missions to the United
Nations, two United States security officers are stationed
outside of the Republic of Korea offices

WHEREFORE, deponent prays that a warrant may issue
for the apprehension of the above-named defendant and that
he may be arrested and imprisoned, or bailed, as the case
may be.

James T. Burnett
JAMES T. BURNETT

Sworn to before me this

17th day of November, 1976

Martin D. Taceris

US Mag.

COURT OF APPEALS
SECOND CIRCUIT

UNITED STATES OF AMERICA,
Respondent,

- against -

ANTHONY A TORRES,
Defendant-Appellant

Index No.

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF

ss.:

I, Kevin E. Thomas, being duly sworn, depose and say that deponent is not a party to the action,
is over 18 years of age and resides at 1515 Macombs Road, Bronx, N.Y. 10452,

That on the 14th day of June, 19 77 at 1 St. Andrews Plaza
New York, N.Y.

deponent served the annexed

upon

Appendix & Brief

U.S.A ttorney-Southern Dist.

Robert Fiske, Jr.

the in this action by delivering a true copy thereof to said individual
personally. Deponent knew the person so served to be the person mentioned and described in said
papers as the herein,

Sworn to before me, this 14th
day of June, 19 77




Print name beneath signature
KEVIN E. THOMAS

ROBERT T. BRIN
NOTARY PUBLIC, State of New York
No. 31-0416050
Qualified in New York
Commission Expires March 30, 1979